Supreme Court, U.S.
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No. ____

In The

Supreme Court of the United States

October Term, 1995

ARMANDO HERMAN CARREIRO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in failing to apply the doctrine prohibiting manufactured jurisdiction, compounding an already-fractured split among the circuits, where federal agents transformed a debt collection into a federal offense by supplying interstate elements and where the creditor-defendant did not freely and voluntarily participate in the act that caused the interstate element to exist.

2. Whether the court of appeals erred in finding the creditor-defendant's attempt to collect a legitimate debt had a sufficient nexus to interstate commerce where the debtor had received a credit for the payment of this debt but converted this sum to its own benefit despite the creditor-defendant's timely requests for payment.

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PETITION FOR WRIT OF CERTIORARI

PRAYER

Petitioner, Armando Herman Carreiro, respectfully prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Seventh Circuit declining to overturn his convictions for extortion, bankruptcy fraud, and Travel Act violation.

OPINION BELOW

The opinion of the Court of Appeals is reported as *United States v. Carreiro*, 68 F.3d 990 (7th Cir. 1995), and appears in the Appendix to this Petition. The trial Court did not issue a written opinion following Carreiro's trial by jury.

JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1) to review the judgment of the Seventh Circuit Court of Appeals. The lower court's opinion in this matter was filed on October 10, 1995.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional provision, in pertinent part:

> The Congress shall have the Power To . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

Constitution, Art. 1, § 8, cl. 3.

This case involves the following provisions of the United States Code:

18 U.S.C. § 1951 (the Hobbs Act):

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section – . . .
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.
>
> (3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

18 U.S.C. § 1952 (the Travel Act):

> (a) Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to –
>
> . . .
>
> (2) commit any crime of violence to further any unlawful activity; or
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,
>
> and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.
>
> (b) As used in this section (i) "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States, or (3) any act which is indictable under subchapter II of chapter 53 of title 31, United States Code, or under section 1956 or 1957 of this title and (ii) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

18 U.S.C. § 152:

> . . . Whoever knowingly and fraudulently receives any material amount of property from a debtor after the filing of a case under title 11, with intent to defeat the provisions of title 11; . . .
>
> Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

Petitioner Herman Carreiro is a Canadian citizen who made a home in Toronto with his wife and four children. At the time of his arrest, Carreiro operated a Toronto-based trucking company called Silverstone, Ltd. Carreiro had only an eighth grade education and had never been to the United States until the day he was arrested. (Tr. 887, 920)

Exchange Parts of America, Inc. (hereafter referred to as "Exchange Parts") was a Chicago-based manufacturing company. Between 1987 and 1989, Exchange Parts used the services of Carreiro's company, Silverstone, to haul certain materials to Chicago from a Canadian supplier called Automet Industries. The total freight charges for these deliveries was $33,000; this bill has never been paid. Carreiro's repeated attempts to collect this unpaid bill culminated in this extortion case.

In September 1989, Carreiro filed a collections suit in Illinois court against Exchange Parts seeking $33,000. (Tr. 221, 888) Over the next nine months, Exchange Parts engaged in tactics to stall the lawsuit until its bankruptcy

terminated the suit. At trial, Exchange Parts' president, Lenard Hoppe, conceded that his company "owed $33,000 in freight to Mr. Carreiro." (Tr. 733) It was also undisputed that, in May of 1990, Exchange Parts received, from its Canadian supplier (Automet), a credit in the amount of $33,000 to cover the outstanding freight charges due Silverstone.[1] Despite receiving this credit, Exchange Parts continued to ignore Carreiro's attempts to collect the money owed to his company.

On May 13, 1991, Carreiro faxed a letter to Exchange Parts' finance director, Mr. Reding, asking for an explanation for why he had not received his money. In this letter, Carreiro writes:

> . . . My lawyer has repeatedly asked your lawyers for an answer to a very simple and direct question: since Exchange Parts has received the money for these freight charges due to Silverstone in the form of this credit, why hasn,t (sic) the money been returned (sic) over to Silverstone and the cost to both sides in attorneys (sic) fees ended. . . . (R. 180; Defendant's Exhibit 9; Tr. 143, 178, 896)

Reding ignored Carreiro's letter and his telephone calls. On June 5, 1991, Joe Milburn, the attorney representing Exchange Parts in the Silverstone litigation, wrote Carreiro's attorney to cancel Reding's deposition. In this letter, Milburn wrote: "We will contact you shortly with alternative dates for Reding's deposition." (Tr. 955) Two

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[1] Automet Industries filed for bankruptcy in 1989. In May of 1990, Exchange Parts demanded and received the $33,000 credit pursuant to a written agreement settling up its accounts with its bankrupt supplier. (Tr. 165-68)

days later, Exchange Parts filed for bankruptcy. (Tr. 147, 600) Neither Carreiro, his trucking company, nor his attorney received any official notice of Exchange Parts' bankruptcy prior to Carreiro's arrest. (Tr. 211, 228, 919) At trial, the government presented evidence that Carreiro heard about Exchange Parts' bankruptcy around the middle of June from a "third-party source." (Tr. 222)

Around this time, Carreiro hired codefendant Michael Taylor, a former truck driver who did collections, to collect the $33,000 debt from Exchange Parts. Carreiro gave Taylor a copy of the final settlement agreement between Exchange Parts and its bankrupt Canadian supplier, Autornet, which showed that Exchange Parts had received the $33,000 credit to cover the outstanding freight charges owed to Silverstone. (Tr. 147-48, 902) Carreiro instructed Taylor to deliver the papers to Exchange Parts' president, Lenard Hoppe, who was claiming to be unaware of the situation. Carreiro did not instruct Taylor to threaten Hoppe. (Tr. 903)

Being from Canada and unfamiliar with Chicago, Taylor recruited codefendant Mark Knox, a Chicago-area resident, to assist in the collection. On June 18, 1991, Knox and Taylor visited the Exchange Parts office and asked to speak with "Mr. Hoppe about some money that [Exchange Parts] owed to Silverstone Trucking." (Tr. 67-68) Taylor also presented the document which Carreiro had given him demonstrating the indebtedness. An Exchange Parts employee informed Knox and Taylor that Hoppe was unavailable and suggested that they return the following day. (Tr. 56, 59, 69) Later that day, Exchange Parts' attorney, Joe Milburn, advised Carreiro's collection

attorney, Joseph Holtzman, about the visit and the bankruptcy. Holtzman said he "would try to speak with Carreiro" to explain that it was no longer legal or appropriate to continue collection efforts. (Tr. 223)

The next day, Knox and Taylor returned to the Exchange Parts offices and again asked to see Mr. Hoppe. This time, Taylor was told that he could not see Hoppe because "the matter was in litigation and because of the litigation neither party was allowed to talk directly to one another." (Tr. 72) Knox and Taylor again left the premises without incident.

Following this second visit, Attorney Miiburn wrote Attorney Holtzman a letter complaining that "[t]his illegal collection activity is intolerable and must cease immediately." (Tr. 201) On June 24, several Exchange Parts employees observed Knox and Taylor sitting in a parked car in the Exchange Parts parking lot. When a security guard approached them, they drove off. (Tr. 323) A few minutes later, Knox, identifying himself as Mr. Ispas, telephoned Hoppe at Exchange Parts and told him that he intended to collect the debt. (Tr. 609) Hoppe also testified that Carreiro telephoned him at home that evening and stated that Hoppe had until tomorrow morning to figure out how he was going to pay his debt. (Tr. 612)

Hoppe testified that the next morning, a car with Knox and Taylor followed him as he walked from his house to his garage and then as he drove to work, with Knox smirking and "waving at me." (Tr. 616) Hoppe testified that when he pulled his car over to the curb to pick up an associate, the other car drove past him; "I recall Taylor had his arm up and his fist clenched and

made a jeering look at me . . . . " (Tr. 617) Hoppe testified that he took Taylor's gesture as a threat and decided, as a result of that threat, to pay Carreiro the $33,000. (Tr. 618) Hoppe then called Carreiro and told him that he was going to write him a personal check for $33,000 and would "send it Federal Express that night." (Tr. 620)

Hoppe went to the bank and obtained a cashier's check, drawn on his personal account. (Tr. 620-21) Hoppe attempted to fax Carreiro a handwritten note which said, "Herman, Fed Express tonight to you. Should receive tomorrow. Exchange Parts Inc. by Lenard Hoppe." (Tr. 622) Before Federal Express came to pick up Hoppe's check, Hoppe was contacted by the FBI. When FBI agents warned Hoppe that sending the check could expose him to prosecution for bankruptcy fraud, Hoppe agreed not to send the check and decided to cooperate with the FBI in a sting operation targeting Carreiro. (Tr. 533, 708-09, 777) Hoppe further agreed to allow the FBI to record his telephone calls. (Tr. 710, 805)

At the agents' direction, Hoppe called Carreiro the next day and falsely stated that his bank refused to certify a check because Carreiro's company is listed as a creditor. (6/26/91, 8:15 a.m., Tr. at pp. 1-2) Carreiro suggested that Hoppe make the check out to another business so Silverstone's name would not appear. (*Id.* at p. 2) Later in the day, Hoppe and Carreiro had the following conversation in pertinent part:

HOPPE Herman, my problem is . . . I'm in Chapter 11 bankruptcy and the bank will not allow me to . . . cut any checks if its not for new value. I can't pay an old debt with a check right now, . . . to do anything other than

that is gonna be . . . an offense against the ah the bankruptcy court. It's a federal indictment. I can't pay you that way. . . . Otherwise I would have given you the money yesterday, when I tried.

CARREIRO Well first you said you were gonna do it Lenard, second then you told me this morning the reason why was because of the name Silverstone on it. Now you've cut that excuse out now. So now it's like what is going on Lenard?

HOPPE Herman I wanted . . . to take care of this thing here.

CARREIRO You remember your conversation this morning that was you couldn't do it because Silverstone is a creditor and they wouldn't allow that to be done. Then when I said to you well . . . cut it under Southwest.

HOPPE Uh ha . . . it's all part of the bankruptcy Herman I gotta have some type of value to cut you the check. I want to take care of this but I have to do it in the confines of the bankruptcy court. Why can't we just work this out as business men?

CARREIRO I tried that for a year and a half.

(6/26/91, 1:33 p.m. Tr.)

Hoppe then complained about the tactics of the collection agents; "Herman, these are your people here." Carreiro responded: "No they're not, it it's a . . . legal collection agency." (*Id.*)

That evening, an FBI surveillance team observed Knox and Taylor drive past Hoppe's residence. Then Knox, posing as "Mr. Ispas," telephoned Hoppe's residence and inquired about the debt. Hoppe told Knox, "I'm not trying to duck the bill. . . . I want to take care of it." (6/26/91, 9:25 p.m., Tr. at p. 2)

On June 27 at 7:30 p.m., Knox and Taylor drove to the Hoppe residence, rang the door bell and then knocked "loudly" on the front door.[2] When no one came to the door, the men returned to their car and drove off. As Knox and Taylor drove away from the house, FBI agents directed the Illinois State Police to assist in "identifying the occupants" of the vehicle. (Tr. 385, 427) More than five state troopers stopped the vehicle, ordered Knox and Taylor out of the car, asked for identification, searched for weapons (they possessed no weapons), and issued a speeding ticket. (Tr. 387-89)

On June 28, at 1:19 p.m., Hoppe told Carreiro that the only way he could raise the money is "to try and sell some company assets out the back door or something and pay you in cash. . . . That's the only other way[3] I could do it." (6/28/91, 1:19 p.m. Tr. at p. 4) Two FBI Agents

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[2] The court below erroneously writes that Knox and Taylor knocked on the front door "for about ten minutes." *United States v. Carreiro*, 68 F.3d at 994. At trial, an FBI surveillance agent, assigned to watch Hoppe's home, testified that Knox and Taylor exited their car at 7:35 p.m., and returned to their car at 7:40 p.m., and that a "total of five minutes passed by from the time they got out of the car until they got back in . . . . " (Tr. 419-20)

[3] The "other" way Hoppe had proposed was to wait to pay Carreiro until "we run the course of bankruptcy court and get out of Chapter 11 bankruptcy." (6/28/91, 1:19 p.m. Tr. at p. 3)

supervising the investigation admitted they directed Hoppe to offer Carreiro cash as a way to induce Carreiro to come to the United States so that he could be arrested. (Tr. 532, 842)

On the evening of July 1, 1991, Hoppe told Carreiro "I could pay you in cash, that's the only way I can do it. . . . I can have the money together by Monday." (7/1/91, 8:30 p.m. Tr. at p. 1) Later that evening, Hoppe told Carreiro that he will have the cash on Monday, July 8, but "I don't want to send it in mail . . . . " Carreiro told Hoppe to "send it by carrier to me." Hoppe replied, "I can't, Herman, I'm not sending 33,000 dollars in the mail. . . . I'll meet you in Detroit or Buffalo or my office, I don't . . . care." (7/1/91, 10:15 p.m. Tr.)

On the evening of July 2, Carreiro told Hoppe to "make a cashier's check out. Send it . . . Fed Ex." Hoppe replied, "I can't buy one, it's traceable." (7/2/91, 8:25 p.m. at p. 1) Carreiro told Hoppe to get the cashier's check from a different bank. However, Hoppe refused to pay with a check. Later, Carreiro told Hoppe to purchase four cashier's checks at "four different banks if you want. . . . that's the only way I'm going to do it." Again, Hoppe refused to pay by check at the FBI's direction. (Tr. 650)

On July 3, Hoppe told Carreiro that he would have the money Monday afternoon, July 8. On the morning of July 8, Carreiro informed Hoppe that he would arrive in Chicago at 4:00 p.m. At 4:55 p.m., Carreiro called Hoppe from O'Hare Airport and arranged to meet him at a restaurant near the airport. Carreiro, Knox and Taylor were arrested at that restaurant.

Carreiro was charged with conspiracy to engage in extortion, attempted extortion, conspiracy to commit bankruptcy fraud and interstate travel to facilitate extortion. At trial, Carreiro asked that the jury be instructed on the defense of entrapment. The trial judge ruled that the evidence was insufficient to warrant an entrapment instruction. (Tr. 1088) The jury found Carreiro guilty on all counts. (Tr. 1123) He was sentenced to fifty-one months in prison pursuant to the federal sentencing guidelines. The court waived imposition of a fine to avoid undue hardship to Carreiro's wife and four children.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT REVIEW BECAUSE THE DECISION BELOW COMPOUNDS AN ALREADY-FRACTURED SPLIT AMONG THE CIRCUITS CONCERNING THE IMPORTANT DOCTRINE OF MANUFACTURED FEDERAL JURISDICTION.

There is a persistent circuit split on the doctrine, first articulated in *United States v. Archer*, 486 F.2d 670, 682 (2d Cir. 1973), that federal agents may not transform a local offense into a federal offense by supplying the interstate element and acting to ensure that an interstate element would be present. In *Archer*, federal agents, investigating corruption in the Queens County District Attorney's office, set up a phony criminal case and arranged to bribe a local prosecutor through a corrupt defense attorney. To assure federal jurisdiction, the undercover agent caused the corrupt defense attorney to place an interstate call to discuss the scheme. The Second Circuit reversed the

defendant's Travel Act conviction based on the doctrine of "manufactured jurisdiction." *Id.* The court noted that at the time federal law enforcement officers became involved, they had no information that the corruption of the Queens County District Attorney's office involved violations of the Travel Act; "the hope was rather that- . . . some interstate or foreign element might occur or, if not, might be injected." *Id.*, 486 F.2d at 677. The Second Circuit summarized its holding as follows:

> Our holding is . . . that when Congress responded to the Attorney General's request to lend the aid of federal law enforcement to local officials in the prosecution of certain crimes, primarily of local concern, where the participants were engaging in interstate activity, it did not mean to include cases where the federal officers themselves supplied the interstate element and acted to ensure that an interstate element would be present. . . . [M]anufactured jurisdiction is a reflection on the federal judicial system and brings it into disrepute.

Id., 486 F.2d at 682 (citations omitted).

Several federal circuits have adopted the principle articulated in *Archer*, although only the Fourth Circuit has reversed convictions on this basis. In *United States v. Brantley*, 777 F.2d 159 (4th Cir. 1985), *cert. denied*, 479 U.S. 822 (1986), an undercover federal agent opened up a phony gambling den and paid the local sheriff to provide protection. The court reversed the sheriff's Hobbs Act conviction because the only interstate elements (the gambling machines and the liquor) were supplied by the FBI as part of its scam. Citing *Archer*, the court held that

"federal agents may not manufacture jurisdiction by contrived or pretensive means." *Id.*, 777 F.2d at 163. Also, in *United States v. Coates*, 949 F.2d 104, 106 (4th Cir. 1991), the court reversed a federal murder-for-hire conviction where "the only reason the sole jurisdictional link (an interstate phone call) occurred here was that it was contrived by the government for that reason alone." Other courts have approved of the *Archer* principle while distinguishing cases on their facts. *See e.g., United States v. McLernon*, 746 F.2d 1098, 1107 (6th Cir. 1984) ("non-manufactured evidence," which showed large-scale drug operation which encompassed the entire country, was sufficient to support Travel Act convictions); *United States v. Bagnariol*, 665 F.2d 877, 898 (9th Cir. 1981), *cert. denied*, 456 U.S. 962 (1982).

In contrast, the Seventh Circuit has repeatedly refused to follow the *Archer* principle. In *United States v. Podolsky*, 798 F.2d 177 (7th Cir. 1986), the defendant agreed to burn down a vacant building. Fearing that there would be no federal jurisdiction for an arson relating to the vacant building, the undercover agent asked the defendant to burn down an adjacent building which was not vacant. The defendant agreed on the condition that the building would be empty of people, a condition which was never met. The defendant was convicted of attempted arson of a building used in interstate commerce.

On appeal, the defendant argued that the government agents improperly manufactured jurisdiction by inducing him to agree to burn a building used in interstate commerce for the sole purpose of assuring jurisdiction. In rejecting this argument, the Seventh Circuit ruled

that the decision of the federal agents to steer the defendant to commit a crime within federal jurisdiction rather than to turn the case over to local authorities is a political rather than judicial decision, having to do with the allocation of resources. *Id.*, 798 F.2d at 181. "The decision to steer Podolsky to number 2438 [the address of the non-vacant building] rather than to hand him over to Chicago police may or may not have been a wise exercise of administrative discretion, but the federal courts do not review the exercise of such discretion unless it is based on invidious grounds, for example race." *Id.*

The Seventh Circuit decision in *Podolsky* is in direct conflict with *Archer*, wherein the Second Circuit held that federal courts do have a duty to oversee federal agents who take it upon themselves to furnish the interstate element that transforms a local crime into a federal crime. In *Podolsky*, the Seventh Circuit stated that "[t]he course of decisions casts doubt if not on the result in *Archer* then on the vitality of the independent principle announced there that forbids the 'manufacture' of federal jurisdiction in circumstances not constituting entrapment and not canceling any element of the crime such as criminal intent." *Podolsky*, 798 F.2d at 177.

The Eleventh Circuit has adopted the Seventh Circuit's view that federal law enforcement officers should be given unfettered discretion to make a federal case out of an otherwise local affair. *See United States v. Petit*, 841 F.2d 1546 (11th Cir.) (government agents properly induced local fence to purchase truckload of stolen goods moving in interstate commerce which agents had borrowed for use in sting operation; "[t]he decision to involve federal, as opposed to state, resources was made

within the bounds of political, rather than judicial, discretion"), *cert. denied*, 487 U.S. 1237 (1988). The Tenth Circuit, on the other hand, has expressly limited the applicability of *Archer* to cases of virtual entrapment. *United States v. O'Connor*, 635 F.2d 814, 817 (10th Cir. 1980). Thus, in *United States v. Esch*, 832 F.2d 531, 539 (10th Cir. 1987), *cert. denied*, 485 U.S. 908 (1988), the court held that federal agents may provide a "conduit for interstate activity" as long as the agents "did not provoke any activity that the defendants were not predisposed to undertake."

The Fifth Circuit recently declined to follow *Archer* in a case where the defendant drove stolen vehicles across state lines at the government's request and for the sole purpose of ensuring the existence of the interstate element of the offense (interstate transportation of stolen motor vehicles). *United States v. Clark*, 62 F.3d 110 (5th Cir. 1995), *petition for cert. filed* (Nov. 9, 1995). There, the court noted that "the defendant voluntarily and of his own free will did the act that caused the interstate element to exist. . . . [T]he government had a legitimate interest in identifying and apprehending car thieves who are willing to steal cars in one state and transport them to another for disposition. . . . Thus, if a 'manufactured federal jurisdiction' concept has a place in federal criminal law, it has no place in this case." *Id.*, 62 F.3d at 114.

This disarray among the circuits is intolerable particularly in today's climate of rapidly expanding federal jurisdiction. The instant case offers an opportunity for this Court to speak on the viability of the important doctrine of manufactured jurisdiction and to settle a split in the circuits. This case is a good vehicle for consideration of the issue because the facts which transformed this collection attempt into a federal crime are not in

dispute. At trial, the federal agents admitted that they directed the debtor (Hoppe) to insist that the creditor-defendant accept payment in the form of cash from a bankrupt company and that he travel to Chicago to collect. The agents thus supplied the interstate elements and acted to insure that such elements would be present.[4]

It was also undisputed that Carreiro was not predisposed to disrupt interstate commerce, travel, or circumvent the United States bankruptcy laws. Most of the circuit courts have refused to apply *Archer* where the defendant freely and voluntarily participated in the jurisdictional act.[5] Here, the agents did not merely provide

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[4] The court below writes that "the record does not establish that the government's intent to establish jurisdiction was the **sole basis** for the payment of Exchange Parts' debt from Exchange Parts' assets rather than from Mr. Hoppe's personal assets or for Mr. Hoppe's insistence that Mr. Carreiro travel to the United States for payment." *Carreiro*, 68 F.3d at 998 (emphasis added). The court suggests alternative explanations for the agents' conduct which were never proposed by the agents themselves and are not supported by the record. For example, the court writes that the insistence that Carreiro travel to the United States "tested Mr. Carreiro's decision to play a personal role in collection. . . . " *Id.* However, the record reveals that Carreiro had no desire to play a personal role in collecting the debt. For more than a year and up until a few days before his arrest, Carreiro begged Hoppe to send him the money by mail, "federal express" or by "carrier" so that he could avoid a trip to Chicago. On July 2, Carreiro complained to Hoppe: "I run eleven trucks up and down the road. I barely get a chance to get out of god-damn office, ain't got time to go to . . . collect something I should have collected already a year and a half ago." (7/2/91, 8:21 p.m. Tr. at p. 5)

[5] *E.g. United States v. Clark*, 62 F.3d 110, 114 (5th Cir. 1995); *United States v. Esch*, 832 F.2d 531, 539 (10th Cir. 1987).

Carreiro the opportunity to commit a federal offense, they required him to commit a federal offense in order to collect a legitimate debt. The Seventh Circuit's rejection of *Archer* in a case where the defendant had to be coerced into participating in the jurisdictional acts has provoked a direct confrontation with the doctrine of manufactured jurisdiction.

When the federal agents began their investigation of Carreiro, the conduct of his bill collectors had barely risen to the level of a misdemeanor assault in the State of Illinois.[6] Moreover, because Carreiro had already agreed to accept payment from Hoppe by personal check, the transaction did not affect interstate commerce. *See United States v. Mattson*, 671 F.2d 1020, 1024 (7th Cir. 1982) (extortion conviction reversed where payment of the bribe depleted only the victim's personal assets and therefore had no "possibility of a direct effect on interstate commerce. . . . ") Nor did the transaction violate the federal bankruptcy laws since Hoppe had agreed to repay the debt with personal funds and he was not in personal bankruptcy.

The federal agents transformed a creditor's attempt to collect a legitimate debt into a federal case of extortion and bankruptcy fraud by directing the debtor to insist on paying the creditor with cash purportedly raised by selling assets of a bankrupt company "out the back door." To persuade the debtor to go along with their plans to manufacture a federal case against the creditor, the agents threatened the debtor with a groundless prosecution for

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[6] On June 19, 1991, following Knox and Taylor's second visit to the Exchange Parts' office, Hoppe contacted the Chicago Police Department but was told that the officers could not intervene because no crime had been committed. (Tr. 606)

bankruptcy fraud.[7] The agents then manufactured a Travel Act violation by insisting that the creditor travel to the United States to receive payment.[8]

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[7] The FBI case agent admitted that he told Hoppe, during their first meeting, that he could be committing bankruptcy fraud if he sent Carreiro the personal check. (Tr. 533) Hoppe testified that the agents had given him and his wife "an opportunity to decide whether or not we wanted to send the check for $33,000 personally and suffer the consequences that way or have an opportunity to have the FBI involved." (Tr. 777) These threats of prosecution were groundless. Because Hoppe was not in personal bankruptcy, paying his debt with a personal check would not have violated any bankruptcy law.

[8] The court below suggests that it is a legitimate law enforcement technique to induce a foreigner to travel to "a jurisdiction where he could be easily arrested." *Carreiro*, 68 F.3d at 998. Even if this is true, that could not save the Travel Act conviction because, under *Archer* and its progeny, the defendant must freely participate in the jurisdictional act. Even the Seventh Circuit used to pay lip service to this requirement. Thus, in *United States v. Peters*, 952 F.2d 960, 963 (7th Cir. 1992), the court rejected the defendant's claim of manufactured federal jurisdiction because the defendant "freely and voluntarily drove his stolen truck from Illinois to Indiana. . . . Mr. Peters showed no reluctance in joining a conspiracy that would result in his stolen truck being transported out of Illinois; when asked, he did not hesitate to transport it out of Illinois himself." Similarly, in *United States v. Gardner*, 516 F.2d 334, 344 (7th Cir.), *cert. denied*, 423 U.S. 861 (1975), the court noted that the defendant "did not consider himself limited by any particular boundaries, but desired to dispose of the Treasury bills wherever the opportunity arose. The Government merely afforded the opportunity and the defendant chose to seize it." Yet, here, where the same court is presented with a case in which the defendant did feel limited by the boundaries of his home country and traveled interstate only against his will, the court quickly abandons this principle of law.

II. THE GOVERNMENT FAILED TO PROVE THE REQUIRED NEXUS TO INTERSTATE COMMERCE TO ESTABLISH FEDERAL JURISDICTION.

At trial, the government relied on the "depletion of assets" theory to establish a connection between the debt collection and interstate commerce.

> Under the depletion of assets theory, commerce is affected when an enterprise, which either is actively engaged in interstate commerce or customarily purchases items in interstate commerce, has its assets depleted through extortion, thereby curtailing the victim's potential as a purchaser of such goods.

United States v. Elders, 569 F.2d 1020, 1023-24 (7th Cir. 1978).

It is undisputed here that the money demanded by Carreiro was the same money that Exchange Parts had received, in the form of a credit, to settle its outstanding liability to Carreiro, and that Exchange Parts had converted that money to its own use.[9] The question thus becomes: How does one affect interstate commerce by

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[9] The evidence showed that Exchange Parts owed Carreiro $33,000 for legitimate freight services rendered and that the debt had been outstanding for more than two years at the time of the alleged extortion. The vice president of finance for Exchange Parts, Mr. Reding, testified that, on May 22, 1990, Exchange Parts received from its Canadian supplier (Automet) a credit in the amount of $33,000 to fully compensate the company for its liability to Carreiro's company, and thereby enriching Exchange Parts in the amount of $33,000. (Tr. 186) Reding admitted that he had demanded and received this credit to cover the outstanding freight charges owed to Carreiro's company. (Tr. 142-43, 165, 196)

demanding his own money that has been stolen from him by the purported victim?

The court below provides the following answer to the above-stated question: "Any economic benefit conferred on Exchange Parts by its credit had long been exhausted by the time of the extortion acts. Exchange Parts' payment of the debt would have reduced its ability to purchase goods in interstate commerce." *United States v. Carreiro*, 68 F.3d at 997. In other words, by the time Carreiro hired Taylor to collect his money, the debtor had already spent it (or, more precisely, stolen it). Therefore, Exchange Parts would have had to pay the debt with company funds that could have been used to purchase goods in interstate commerce.

The Seventh Circuit's bizarre theory for how a creditor can affect commerce by demanding his own money should be reviewed by this Court because it extends the scope of commerce power beyond reasonable boundaries and because it establishes bad policy by providing the wrong incentives for both parties in a collection dispute. Under the ruling of the court below, a creditor is better advised to forego legitimate collection methods because such time-consuming methods give the debtor time to spend the creditor's money. Then, with the money expended, the creditor is forced to demand company funds which might result in a federal prosecution. Here, Carreiro is penalized for the year in which he attempted to collect his money through legitimate means (i.e. hiring a collection attorney, filing suit, making repeated telephone calls, sending faxes).

The lower court's theory further allows the debtor to create federal jurisdiction by wrongfully spending the funds earmarked for the creditor and thus requiring the creditor to demand company funds. Congress could not have intended for federal jurisdiction to be created by the wrongful conduct of the victim.

To sanction the federal prosecution of Carreiro under these circumstances would effectively obliterate the distinction between state and federal law enforcement, at least in the area of debt collections. As this Court recently stated, "the scope of interstate commerce power . . . may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectively obliterate the distinction between what is national and what is local and create a completely centralized government." *United States v. Lopez*, 115 S. Ct. 1624, 1628 (1995) (*quoting Jones v. Laughlin Steel*, 301 U.S. 1, 37 (1937)). Because Carreiro demanded only the money which Exchange Parts received for the express purpose of paying Carreiro, and because it was Exchange Parts' wrongful conduct and not Carreiro's which caused the depletion of company assets, the requisite nexus to interstate commerce was not shown in this prosecution.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit in this matter.

Respectfully submitted,

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